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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MAGGIE SANKIKIAN,

Defendant and Appellant.

B282229

(Los Angeles County
Super. Ct. No. BA442828)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund Willcox Clarke, Jr., Judge. Affirmed with directions.

Janet Uson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Maggie Sankikian (Sankikian) guilty of possessing drugs for sale, for the benefit of, at the direction of, or in association with a criminal street gang. Below, the trial court admitted evidence of Sankikian's prior drug-related activity and offenses. On appeal, Sankikian's contentions primarily concern alleged errors in admitting that evidence. We reject these and her other contentions. However, due to recent legislation, we vacate her sentence but otherwise affirm the judgment.

BACKGROUND

I. Sankikian's current crime

At 4:30 a.m. on December 17, 2015, police officers searched an apartment on Coronado Street in Los Angeles near Lafayette Park. Terry Washington and Sankikian were in the apartment. From personal effects scattered about, it appeared that a woman lived there. A receipt made out to Alma Mercado was found in the apartment.

Drugs and drug paraphernalia were also in the apartment. Officers recovered 172.05 grams of marijuana, 14 cell phones, syringes, a plastic baggie containing 0.78 grams of methamphetamine, a second plastic baggie containing 0.09 grams of methamphetamine, 97 unused plastic baggies, three scales, a glass pipe, and a folding knife. One baggie containing methamphetamine had a green alien face on it, as did the empty baggies.

Sankikian was arrested and gave a statement to Officer Joshua Byers.¹ She told him she had lived in the apartment on

¹ Due to redactions, some of her statements are without context.

Coronado for about two months. She admitted she was a member of the Mara Salvatrucha gang (MS-13). She is known as Goofy. When asked if she still claimed the neighborhood, Sankikian said, “I’m still from there; I’m not a drop out.” She belonged to the Park View Locos clique of MS-13. Although she did not participate in “activities” or gang bang, she wasn’t ashamed of her membership and was not trying to hide it. She admitted having committed crimes in the past, “I’m pretty sure you’ve seen my file already, right? All I’ve been busted [for] is . . . sales” and possession for sale. She denied selling drugs at Lafayette Park, but people sold drugs for her. Once, she “socked” her worker for doing something stupid. When asked whether the “guy that got stabbed, was he working for you?” she hedged, “Maybe. [¶] . . . [¶] But.” “And I don’t have anything to say after that.”

Gang expert Officer Hector Diaz had been assigned to a gang and narcotics division since 2005. Based on a hypothetical question modeled on the facts of the case, he opined that the marijuana and methamphetamine were possessed for sale. The presence of scales, baggies, and syringes, which are used to inject methamphetamine and which a street dealer will give to users, were indicia of sale. Also, dealers use bags with the same design or imprint, such as alien faces, to distinguish their drugs from those of other dealers. The 0.78 grams of methamphetamine is worth about \$20. The 0.09 grams of methamphetamine is worth about \$10. And the 172.05 grams of marijuana can be broken down into \$5 or \$10 bags.

II. Evidence of Sankikian’s prior crimes

To show Sankikian’s intent, the People introduced three prior drug-related arrests and wiretapped phone calls between Sankikian and other MS-13 gang members.

A. *Sankikian's prior arrests*

In December 2005, Sergeant Aaron Shapiro went to a location on South Park View, which was an area controlled by MS-13. He detained Sankikian for loitering on private property. She had four baggies of marijuana and a fixed-blade kitchen knife. Sankikian said she was selling marijuana to get off the streets.

In June 2006, Officer Diaz was working undercover in downtown Los Angeles. Sankikian, who was with two men, said to Diaz, "Chiva, Chiva," which refers to heroin. Diaz said he wanted "four for 20"—four balloons of heroin for \$20. One of the men spit two balloons from his mouth and gave them to Diaz.

In April 2011, Officer Jaime Martinez was posing as a narcotics buyer. The officer called a number. A woman who identified herself as Maggie answered. They discussed what Martinez wanted (crystal and coke) and the quantity and price (an eight ball for \$400). They agreed to meet. Sankikian was at the appointed location. Martinez gave Sankikian premarked money in exchange for drugs. Sankikian was arrested, and she wrote a statement admitting she sold the cocaine and methamphetamine.

B. *The wiretaps*

In December 2015, Detective Howard Jackson was investigating the Park View Locos clique of MS-13. As part of that investigation, he wiretapped phone calls of MS-13 gang members. The prosecutor played those recorded calls, which were between Sankikian, Eduardo Orellano, and Jose Rodriguez. Orellano is Park View's shot caller throughout the United States. Rodriguez is a foot soldier or enforcer.

During one call in October 2015, Sankikian told Orellano she had “the stuff” and asked if she could be put to work.

In a second call, Orellano told Sankikian that the “kids are going to swing by and pick up that thing” and would “leave something there.” Sankikian asked Orellano to “leave me something right now, ’cause I already have a shitload of clients waiting.”

In a third call, Orellano asked if Sankikian had sold “that thing just now?” Sankikian replied she still had it and would give it back to him.

During another call, Orellano told Sankikian that someone was saying she was “making dough?” Sankikian demanded to know who was saying that, because she was struggling to pay her rent. She had the “brown kind” of “candy” and would call him as soon as she got to the clique. “Candy” is a street term for narcotics.

In another call with Rodriguez, Sankikian asked for more candy.

In a sixth call, Sankikian said a problem with “Juan” needed to be fixed. “That dude is crossing a fucking line, man . . . I think it’s time we get that fool out of there. I’m done man, I’m done with his problems, because in the end he’s going to turn into a rat.”

III. Gang evidence

Police Officer Tomas Perez is in gang enforcement detail. He primarily gathers intelligence on MS-13, a transnational gang in the United States and Central and South Americas. MS-13 has cliques, which are subgroups of the larger gang: “So they are all still members of that gang, but they identify themselves by a smaller subgroup of the gang.” In the Rampart area of Los

Angeles, MS-13 cliques include Park View Locos, Coronado, Little Psychos, and Rampart Locos. MS-13 cliques get along and commit crimes together, which might be unique to MS-13. The officer was unaware of any significant conflicts between MS-13 cliques, because MS-13 management “squashes these conflicts for the purposes of business.” Park View Locos is also transnational, with thousands of members, although only 50 members are in Los Angeles County. Park View Locos territory extends from Wilshire Boulevard to Olympic Boulevard. The Rampart Division and Lafayette Park are MS-13 strongholds, and a couple of cliques share Lafayette Park, although the Coronado and Little Psychos cliques largely claim it.

To gain the gang’s trust, a member must put in work, i.e., commit crimes. Gangs protect their territory through violence, ranging from beatings to murder. Nonmembers of MS-13 are not permitted to sell drugs in Lafayette Park and could suffer a “serious consequence” if they do so without permission. In the three years Officer Perez had been assigned to monitor the gang, MS-13 had murdered three rival gang members in Lafayette Park and been involved in four stabbings.

Officer Perez had field contact with Sankikian on December 31, 2015, after she’d been arrested on the current crimes. She admitted she was a member of MS-13 and of Park View Locos. He noted that Sankikian had “MS 13” and “PVLS” tattooed on her wrist. “Mara Salvatrucha” is tattooed on her back. Sankikian and Officer Perez discussed a “takedown” involving a “couple of other murders.” But she denied involvement in murder: she only sold drugs.

Based on a hypothetical question modeled on the facts of the case, Officer Perez opined that the possession for sales was

for the benefit of, at the direction of, or in association with a criminal street gang. Selling drugs benefits the gang because drugs provide revenue and allow the gang to pay for lawyers, weapons, and vehicles. Proceeds from drug sales are “filtered up the chain appropriately.” Drug sales also occur at the direction of the gang, as the flow of drugs goes through “a very specific channel,” beginning with a gang leader who directs it to be sold at a street level.

IV. Procedural background

A jury found Sankikian guilty of possession of methamphetamine for sale (Health & Saf. Code, § 11378; count 1) and of possession of marijuana for sale (*id.*, at § 11359; count 2). The jury found true a gang allegation as to both counts (Pen. Code, § 186.22, subd. (b)(1)(A)).

On March 2, 2017, the trial court sentenced Sankikian to the midterm of two years, doubled to four years based on a prior strike, on count 1, plus three years for the gang enhancement, five years for a prior serious felony conviction (Pen. Code, § 667, subd. (a)), and two 3-year terms (Health & Saf. Code, § 11370.2, subd. (a)). The trial court imposed a concurrent sentence on count 2.

CONTENTIONS

Sankikian raises these contentions: (1) admitting evidence she was involved in a gang-related murder violated her due process rights, (2) the wiretapped calls and her prior arrests should have been excluded, (3) instructional error, (4) error in failing to give a unanimity instruction, (5) insufficiency of the evidence to support the substantive crimes and the gang

allegation, (6) prosecutorial misconduct, (7) failure to continue the sentencing hearing, and (8) sentencing issues.

DISCUSSION

I. Admissibility of evidence Sankikian was involved in a stabbing

Sankikian contends that the trial court denied her due process by admitting evidence she was involved in a gang-related murder at Lafayette Park. We disagree.

A. *Additional background*

After Sankikian was arrested, Officer Byers asked her whether “the guy that was stabbed, was he working for you[?]” She answered, “Maybe. [¶] . . . [¶] But.” When the officer pressed her with, “But what?” she said, “And I don’t have anything to say after that.” Before trial, the prosecutor informed the trial court that she intended to introduce this statement. Defense counsel objected under Evidence Code section 352² and relevance and argued that the statement raised a peripheral issue of violence.³ The trial court agreed “it [was] an issue of violence,” but “in another view, [it is a] means of enforcement of a business model.” The trial court found that if Sankikian said people sold drugs for her, that was relevant.

² All further undesignated statutory references are to the Evidence Code.

³ Sankikian did not object to the statement under section 1101 in the trial court.

B. *The trial court did not abuse its discretion*

Sankikian complains that the trial court improperly admitted evidence she was involved in the murder of her worker at Lafayette Park. That, however, was not the evidence. Sankikian's statement was that her worker was stabbed. Where he or she was stabbed, whether he or she died, and whether Sankikian was involved in the stabbing were *not* in evidence. As to what was in evidence—Sankikian's worker was stabbed—that was relevant and admissible, as we now discuss.

Only relevant evidence is admissible. (§ 350.) Relevant evidence is “evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (§ 210.) But, even relevant evidence may be excluded if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (§ 352.) We review a trial court's evidentiary rulings for abuse of discretion, and we will not disturb them unless the court “exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.) The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

Here, Sankikian's statement about her worker was relevant. She was charged with possessing narcotics for sale, for the benefit of, at the direction of, or in association with, a criminal street gang. That a “worker” sold drugs for her was

directly relevant and highly probative to show Sankikian possessed the drugs with the intent to sell them, rather than for personal use. Also, that her worker was stabbed was relevant to the gang allegation. Gang expert Officer Perez testified that gangs protect their areas through violence. A reasonable jury could conclude that the stabbing was thus connected to a gang's control of its drug territory.

Sankikian, however, argues that the statement's probative value was outweighed by its prejudice, because it implicated her in murder. However, Sankikian was *not* implicated in it. The trial court made a point of eliciting testimony from Officer Byers that Sankikian had not been accused in connection with the crime. The trial court asked the officer in front of the jury: "Detective, it was never your belief Ms. Sankikian was involved in causing the stabbing, was it?" Officer Byers agreed that Sankikian "wasn't accused of doing the stabbing, right." The trial court then clarified, "You're asking for a different reason here? My understanding is this was offered to show [there was] someone working for her and for no other reason. Is that why the People are offering this passage[?]" The prosecutor agreed, and the trial court immediately instructed the jury: "[T]his passage is being offered to show there was someone working for her, not that she stabbed the person."

Even so, Sankikian argues that other evidence strengthened an inference she was involved in the stabbing, which she mischaracterizes as a murder. She first points to gang expert Officer Perez's testimony that MS-13 murdered three rival gang members at Lafayette Park and stabbed four rivals or perceived rivals. One murder was of a Florencia Trece rival gang member who was selling at the park without permission. This

testimony in no way implicated Sankikian in any murder or act of violence. Rather, Officer Perez's testimony concerned MS-13's violence toward *rival* gang members, whereas Sankikian's statement concerned *her* worker, who presumably was not a member of a rival gang. Officer Perez's testimony thus generally tended to show that MS-13 commits murders and other crimes of violence to control its territory and drug sales. The testimony did not concern Sankikian specifically.

Moreover, when Officer Perez testified about acts of violence MS-13 had committed to control its territory, the trial court immediately instructed the jury that "this is offered primarily so you'll understand the issues necessary to prove whether an entity is or is not a criminal street gang. This is not being offered to prove that . . . Sankikian is guilty of the charged offense, . . . [s]o many things may be presented without any suggestion . . . Sankikian is connected to it, but simply that this entity, and the people in the entity, have done various things that this witness may know about."

Second, Sankikian points to Officer Perez's testimony that during one of the wiretapped calls Sankikian complained that "we need to fix a problem with Juan," who was "crossing a fucking line." "Like I, I don't know, I think it's time we get that fool out of there. I'm done man, I'm done with his problems, because in the end he's going to turn into a rat, man." Officer Perez explained the significance of Sankikian's statement: she was "making a threat on their lives, saying that they need to be taken care of because they believe [J]uan will be a rat. [¶] So the way it's stated to me, it sounds—potentially they would want [J]uan to be murdered because of the problem he's causing, interfering with the sale of narcotics." Sankikian complains that

this evidence linked her to her worker's "murder" at Lafayette Park. However, Officer Perez's testimony did not link her to any murder at Lafayette Park. No connection was made between "Juan" and Sankikian's worker who was stabbed.

Finally, Sankikian argues that the prosecutor linked her to the so-called murder of her worker. Not so. The prosecutor merely argued that Sankikian told MS-13 shot callers about issues in the park, "[w]anting to kick somebody out of the park who may be ratting on her." The prosecutor also referred to Sankikian's statement that she "socked" one of her workers. These comments were made to show that Sankikian sold drugs for her gang. In no way did the prosecutor state or infer that Sankikian killed someone.

II. Prior crimes evidence

As we summarized above, the People admitted wide-ranging evidence that Sankikian had committed prior drug crimes: her statement to Officer Byers that she had been "busted . . . for . . . sales"; the wiretapped calls; and her prior drug arrests. She now objects that the calls and her prior drug arrests should have been excluded because they were insufficiently similar to her current crimes.

Sankikian has forfeited this issue. During a pretrial hearing, the prosecutor indicated her intent to introduce Sankikian's prior drug sales under section 1101, subdivision (b), as well as Sankikian's statement to Officer Byers. The trial court requested briefing and a copy of Sankikian's statements, which the prosecutor later provided. Thereafter, during a break in the testimony of the People's first witness and before Officer Byers testified, defense counsel objected to Sankikian's statements to Byers and, in that context, reminded the trial court that it had

not yet ruled on the section “1101(B) evidence.” The trial court admonished counsel that they were still discussing the admissibility of Sankikian’s statements to Officer Byers, and to stick with one subject at a time. Over the defense objections under sections 352 and 1101, the trial court admitted Sankikian’s statement to the officer that she had been “busted for . . . sales.” The trial court said it would allow the People to use “this prior conduct because of the gang enhancement and the theory of the People that if she’s doing this much selling in an area controlled by that dangerous entity, that it becomes less and less probable that she’s not doing it for them.” As to the other evidence of Sankikian’s prior crimes—the wiretapped calls and her prior arrests—it came in without further objection or discussion about section 1101.⁴ Sankikian failed to obtain a ruling on her objection to this evidence; she has therefore forfeited the issue.⁵ (See generally *People v. Virgil* (2011) 51 Cal.4th 1210, 1249; *People v. Ramirez* (2006) 39 Cal.4th 398, 450.)

In any event, her claims fail on the merits. Section 1101, subdivision (a), prohibits admission of other crimes evidence to show the defendant’s bad character or criminal propensity. But, other crimes evidence is admissible when relevant to prove some

⁴ The defense did object that the wiretapped calls lacked foundation.

⁵ Although the trial court never ruled on the admissibility of the wiretapped calls and Sankikian’s prior arrests, the trial court thought it had ruled on them. While discussing CALCRIM No. 375, which concerns the limited purpose for which a jury can consider uncharged offenses, the trial court noted that the defense had objected but that the court had allowed the evidence to prove intent.

fact—e.g., motive, intent, plan, knowledge, identity, and absence of mistake or accident—other than the defendant’s disposition to commit such an act. (*People v. Catlin* (2001) 26 Cal.4th 81, 145–146; § 1101, subd. (b).) In the context of prosecutions for drug offenses, evidence of prior drug convictions is generally admissible under section 1101, subdivision (b), “to establish that the drugs were possessed for sale rather than for personal use and to prove knowledge of the narcotic nature of the drugs.” (*People v. Williams* (2009) 170 Cal.App.4th 587, 607; *People v. Pijal* (1973) 33 Cal.App.3d 682, 687, 691 [prior drug offenses admissible to show defendant’s “guilty knowledge,” motive and intent].) For evidence of uncharged crimes to be admissible under section 1101, subdivision (b), they must be sufficiently similar to support a rational inference of these material facts. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).) The least degree of similarity between the uncharged act and the charged one is required to prove intent. (*Ibid.*; *People v. Jones* (2011) 51 Cal.4th 346, 371.)

Here, the uncharged offenses were admitted to prove Sankikian’s intent to sell and her knowledge of the illegal nature of the drugs. On those issues, Sankikian’s prior crimes were sufficiently similar to the charged ones. Her 2005 arrest involved marijuana, as did the current crime. Her 2011 arrest involved methamphetamine, as did the current crime. The wiretapped calls were similarly admissible to prove Sankikian’s intent to sell and her intent to sell for her gang. The calls were with MS-13 gang members: Orellano, a shot caller, and Rodriguez, a foot soldier. In those calls, Sankikian discussed obtaining and selling drugs and controlling the territory in which she sold drugs. Thus, the calls were highly relevant to both her intent and to the

gang allegation, because they showed she was still selling drugs at the direction of and in association with her gang.

Sankikian, however, argues that her prior criminal acts were insufficiently similar to her charged conduct. That is, when arrested for her current crimes she was not engaged in a drug transaction, her 2006 arrest involved a different drug (heroin), the prior incidents occurred at different locations, and the 2011 incident involved a different method of sales. These minor differences in how Sankikian sold drugs do not render her prior arrests so distinctive from her current crimes as to impact admissibility, as they in no way diminish their probative value to the issues for which they were offered: that she intended to sell the drugs she possessed in association with and for the benefit of MS-13.

Finally, we cannot agree that the prejudicial effect of the prior crimes evidence outweighed its probative value. (§ 352; *Ewoldt, supra*, 7 Cal.4th at p. 404.) Sankikian complains that the prosecutor used the uncharged offenses to argue she had a criminal disposition to sell drugs. This is inaccurate. The prosecutor argued that the evidence showed Sankikian was a drug dealer who had sold marijuana and methamphetamine in the past, so “she knows what those substances are” and intended to sell them this time. This argument was about intent and knowledge, not criminal disposition.

Even if we agreed that the evidence should have been excluded, we would find any error to be harmless. We review the erroneous admission of other crimes evidence under *People v. Watson* (1956) 46 Cal.2d 818, 836. Under that standard, we will not reverse a trial court’s judgment unless it is reasonably probable a result more favorable to Sankikian would have been

reached in the absence of the error. Moreover, even where a trial court renders an erroneous evidentiary ruling, a defendant's due process rights are usually not violated. (*People v. Partida, supra*, 37 Cal.4th at p. 439.)

Here, for two months Sankikian lived in an apartment where methamphetamine, marijuana, and drug paraphernalia, including scales and syringes were found. When she was arrested, she admitted to Officer Byers that she was still a member of MS-13. And, when she was released on bail, she admitted the same to Officer Diaz when he encountered her in the field, and she admitted being involved in selling drugs. Sankikian had MS-13 tattoos, including "Mara Salvatrucha" on her back. Based on this evidence, it is not reasonably probable a result more favorable to Sankikian would have been reached in the absence of the admission of the wiretapped calls and her prior arrests.

III. Instructional error

The trial court instructed the jury with CALCRIM No. 375, regarding the prior crimes evidence.⁶ However, the trial court

⁶ "The People presented evidence that defendant committed other offenses that were not charged in this case. [¶] You may consider this evidence only if the People have proved, by a preponderance of the evidence, that the defendant, in fact, committed the offenses. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the offenses, you may, but are not required to, consider that evidence for the limited purpose of deciding

did not include this language: “Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.” This omission, Sankikian contends, violated her due process rights and lowered the prosecution’s burden of proof.

We are unpersuaded. As given, the instruction told the jury it could consider the evidence only for three limited purposes: (1) her intent with respect to the gang allegation; (2) her intent to sell the drugs; and (3) whether she had a plan or scheme to commit the current crimes. The instruction admonished the jury not to “consider this evidence for any other purpose.” Further, the instruction stated that other crimes evidence was insufficient, by itself, to prove Sankikian guilty of the current crimes. Thus, even in the absence of the omitted language, the jury would have understood that the prior crimes evidence was not admissible to establish mere criminal disposition. We presume the jury understood and followed the instruction. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

whether or not the defendant acted with the intent to follow the directions of a criminal street gang, or acted in association with a criminal street gang, or for the benefit of a criminal street gang; or the defendant acted with the intent to sell methamphetamine, or marijuana in this case; or, the defendant had a plan or scheme to commit the offenses charged . . . in this case. [¶] Do not consider this evidence for any other purpose. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient, by itself, to prove the defendant guilty of count one or count two, or that the enhancing allegation of the crime was committed at the direction of, . . . in association with, or for the benefit of a criminal street gang has been proved. The People must still prove every charge and allegation beyond a reasonable doubt.”

Sankikian similarly argues that the instruction lowered the prosecution's burden of proof for the gang enhancement. She bases this argument on two factors. First, the prosecutor argued that Sankikian acted in association with MS-13 and sold drugs in its territory. Second, the only time she sold drugs in MS-13 territory was in December 2005, based on Officer Shapiro's testimony. From these two factors, Sankikian posits that the prosecutor thus relied on the 2005 incident to prove the gang enhancement. Yet, per CALCRIM No. 375, the jury was told it could find the 2005 incident true based on a preponderance of the evidence; hence, the burden of proof as to the gang allegation was lowered.

This argument is premised on a misunderstanding of the prosecutor's argument and a constricted interpretation of the evidence. The prosecutor's argument, which was based on the evidence, was that Sankikian sold drugs in MS-13 territory. Sankikian's 2005 arrest was mere evidence of that. Indeed, that Sankikian sold drugs in MS-13 territory was a reasonable inference from the totality of the evidence. Moreover, CALCRIM No. 375 made it clear that the uncharged offenses, including the 2005 offense, had to be proven by a preponderance of the evidence, but the "People must still prove every charge and allegation beyond a reasonable doubt."

IV. Unanimity instruction

Sankikian next contends that the trial court failed to ensure the jury unanimously agreed the gang allegation applied to the charged offenses occurring on December 17, 2015, as opposed to the uncharged offenses described in the wiretapped calls. This contention is based on two questions the jury asked. First, the jury asked for the dates of the wiretapped calls. In

response, the trial court referred the jury to the disc of the wiretapped calls which contained the dates.

The next day, the jury asked a second, two-part question: “1) If we feel the defendant, who is associated with the gang (MS), sells narcotics she attained by herself and not from the gang, moreover, that profits only herself and not the gang, is it still gang enhancement? [¶] 2) If we feel the defendant does sell drugs for the gang (MS) and herself, does that qualify for gang enhancement?” The trial court answered the first question, “No.” And, with defense counsel’s agreement,⁷ answered the second: “A crime committed for a criminal street gang need not be committed exclusively for the gang. Possession of any amount of methamphetamine, or any amount of marijuana, with the intent to sell for the benefit of the gang, qualifies for the gang enhancement, even if other amounts were intended for another use.”

From these questions about the date of the wiretapped calls and the gang allegation, Sankikian extrapolates that the jury was confused as to which drug crimes the gang allegation applied: those committed on December 17, 2015 when Sankikian was found in an apartment with drugs or the uncharged offenses referenced in the wiretapped calls. Hence, Sankikian posits the trial court should have given a unanimity instruction.

Such an instruction, however, is required when the evidence suggests more than one discrete crime, for the jury must agree on the same criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Here, neither the jury’s questions nor the

⁷ Counsel did express concern that the jury was not “separating” her client’s drug possession on December 17, 2015 from the evidence she had drugs on other dates.

record suggest that the discrete crime at issue was anything but Sankikian's possession of drugs on December 17, 2015.

The prosecutor's and the defense's arguments made clear that Sankikian was charged with possessing drugs on December 17, 2015. The prosecutor told the jury it was "here because Maggie Sankikian . . . was a drug dealer for MS-13, selling drugs with a stash in her Coronado studio apartment in MS-13 territory." The prosecutor proceeded to detail the drugs and drug paraphernalia in the apartment. And, in the context of answering the question, "[W]as a crime committed?" the prosecutor referred to the drugs littered throughout the studio apartment. Also, defense counsel repeatedly told the jury that the only thing "we are concerned with is what happened on December 17, 2015. [¶] [Sankikian] is on trial for something they allege happened on that date, so she is not on trial for something that happened" on other days. What happened on those other days is "being introduced as evidence to help you consider what happened, or may not have happened, on December 17th of 2015."

Thus, based on the evidence and argument, there was only one discrete crime at issue in each count to which the gang allegations attached.

V. Sufficiency of the evidence

Sankikian contends that there was insufficient evidence to support her conviction for the substantive drug charges and for the gang allegation. Further, she contends that the prosecution failed to establish a link between Park View Locos and MS-13, under *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*). After setting forth the standard of review, we discuss each contention.

A. *Standard of review*

The same standard of review applies to claims of insufficient evidence to sustain a criminal conviction and a gang allegation. We “ ‘review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ ” (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears “ ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ ” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Brown* (2014) 59 Cal.4th 86, 106.) Where the circumstances reasonably justify the jury’s verdict, we may not reverse the judgment simply because the circumstances can be reconciled with a contrary finding. (*Ibid.*; *Zamudio*, at pp. 357–358.)

B. *Sufficiency of the evidence to support the drug convictions*

The elements of the offense of possessing restricted drugs for sale are physical or constructive possession of the drugs, with knowledge of the presence and narcotic character of the drugs, for the purpose of sale. (*People v. Johnson* (1984) 158 Cal.App.3d 850, 853.) Possession requires that the defendant have dominion and control over the contraband. (*Ibid.*; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.)

There was sufficient evidence Sankikian had dominion and control over the drugs. She had been living for two months in the Coronado apartment, and not many people came there. Methamphetamine, marijuana, and drug paraphernalia were in the apartment. Even after her arrest on the current crimes, she told Officer Perez that she was involved in selling drugs. Sankikian's other statements to Officer Byers and the uncharged offenses established she had sold drugs in the past. The combination of this evidence was more than sufficient to establish the elements of the crimes.

That there was evidence from which the jury could have found otherwise—e.g., the drugs and drug paraphernalia were not all in plain view in the apartment so perhaps Sankikian did not know they were there; the receipt made out to Mercado and presence of Washington, suggesting someone else was connected to the drugs; and the drugs were not yet packaged for sale—does not render the evidence insufficient to support the verdicts. Weighing the evidence is a job for the trier of fact, not this court. (*People v. Brown, supra*, 59 Cal.4th at p. 106.)

C. *Sufficiency of the evidence to support the gang allegation*

To prove the gang enhancement, the prosecution must establish, first, the crime was gang related and, second, it was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484.) Here, Sankikian merely argues that the jury's question quoted above in Discussion Section IV suggested that the evidence was not "overwhelming." Even if we interpreted the question in that way, the issue is not whether the evidence was overwhelming. The issue is whether it

was sufficient. It was: Sankikian was an admitted MS-13 gang member who told Officer Byers that she had sold drugs in the past and who had been recently recorded asking for drugs from fellow MS-13 gang members.

Sankikian points to other evidence that she was not selling the drugs for the gang, e.g., there was no indicia of gang activity in the apartment. Again, this is an improper reweighing of the evidence.

D. Prunty

Sankikian argues that the People failed to prove an organizational connection between MS-13 and its clique, Park View Locos, under *Prunty, supra*, 62 Cal.4th 59. *Prunty* considered what showing the prosecution must make to support its theory that gang subsets constitute a single criminal street gang under Penal Code section 186.22, subdivision (f). When “the prosecution seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang’s alleged subsets, it must prove a connection between the gang and the subsets.” (*Prunty*, at pp. 67–68, 80–81.) *Prunty* thus applies “where the prosecution’s theory of why a criminal street gang exists turns on the conduct of one or more gang subsets, not simply to those in which the prosecution alleges the existence of ‘a broader umbrella gang.’” (*Id.* at p. 71, fn. 2.)

Prunty described ways in which the prosecution can prove organizational and associational connections between a gang and its subsets. A prosecutor can show that subsets are part of a “loose approximation of a hierarchy,” where the shot caller of a subset answers to a higher authority. (*Prunty, supra*, 62 Cal.4th

at p. 77.) Or, a prosecutor can show that cliques conduct independent but harmonious criminal operations within a discrete geographical area to show they are part of a single entity. (*Id.* at pp. 77–78.) Evidence that subsets work together thus could show the “existence of a genuinely shared venture.” (*Id.* at p. 78.)

To the extent *Prunty* applies here, there was sufficient evidence of an organizational connection between MS-13 and Park View Locos. Officer Perez testified that members of MS-13 cliques are still members of MS-13. All MS-13 cliques “pay homage” to MS-13. Cliques, for example, share earnings with MS-13. And, when a clique puts up graffiti, they identify their clique and MS-13: “You generally see an MS-13 in some form. And then the clique will be denoted in there, P-V-L-S for Park View Locos.” Similarly, a Park View Locos might tattoo PVLS on her body but would also have MS-13 tattoos. Indeed, Sankikian had “PVLS” and “MS-13” on her wrist, and “Mara Salvatrucha” on her back. Such tattoos of a gang’s name along with its clique is a “corporeal representation of the association between the gang and one of its subsets.” (*People v. Garcia* (2017) 9 Cal.App.5th 364, 379.)

Also, where the activities of subsets benefit the same higher ranking group, this is evidence of organizational linkage. (*Prunty, supra*, 62 Cal.4th at p. 77.) Here, Officer Perez testified that MS-13 is unique, because its cliques, including Park View Locos, get along and commit crimes together. This is not happenstance. It is MS-13’s business model: MS-13 management “squashes these conflicts for the purposes of business.” Hence, the Coronado and Little Psychos cliques of MS-13 share Lafayette Park. (*Id.* at pp. 77–78 [harmonious criminal

operations in discrete area shows subsets part of single entity].) Further, Officer Perez described an instance where management enforced its will: two cliques were having a boundary conflict, and the person “who had the management side” said it would be taken care of and then told cliques what were the boundaries to resolve the problem. Where “‘higher-ups’” deal with problems between lower level members, that is evidence of an organizational connection. (*People v. Petitie* (2017) 16 Cal.App.5th 23, 50.)

VI. Prosecutorial misconduct

Sankikian cites three instances of alleged prosecutorial misconduct. We find no misconduct.

A prosecutor’s intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves using deceptive or reprehensible methods to attempt to persuade the court or jury. (*Ibid.*)

First, Sankikian argues that the prosecutors improperly inferred she was involved in a murder. We have already explained that the evidence introduced was that Sankikian’s worker was stabbed. The evidence was *not* that Sankikian was involved in murdering her worker. Although Sankikian faults the prosecution for so implying, she does not cite any statement a prosecutor made to that effect, and we discern none. Therefore, there is no pattern of egregious conduct or the use of deceptive or reprehensible methods to attempt to persuade the jury. (*People*

v. Samayoa, supra, 15 Cal.4th at p. 841.) Still, there was evidence that Sankikian was not adverse to violence. She told Officer Byers she “socked” one of her workers. Also, in one of the wiretapped phone calls, she told a fellow MS-13 member that the “rat” Juan needed to be taken care of. However, as we have also explained, the evidence was properly admitted because it showed that Sankikian was involved in selling drugs for her gang. Moreover, Sankikian did not object to the wiretapped calls. And although the prosecutor referred to this evidence, it was in the context of proving the gang allegation and not to connect Sankikian to a murder.

Second, Sankikian complains that the prosecutor introduced evidence of the uncharged offenses before the trial court had ruled on their admissibility. However, as we have said, the defense objected, but when the trial court delayed its ruling, the defense did not renew its objection. We therefore fail to see how the prosecution can be faulted for failing to remind the trial court about a *defense* objection. In any event, the uncharged offenses were admissible to establish Sankikian’s intent and the gang enhancement.

Finally, Sankikian faults the prosecution for improperly relying on a gang-related murder as a predicate offense to establish the gang enhancement. Penal Code section 186.22, subdivision (e), defines a pattern of criminal gang activity as “the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more [enumerated] offenses, *provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense*, and the offenses were committed on separate occasions,

or by two or more persons.” (Italics added.) What the italicized language means is that the last of the predicate offenses must have occurred within three years after a prior offense. (*People v. Fiu* (2008) 165 Cal.App.4th 360, 388.)

Here, the predicate offenses the prosecution introduced were a murder committed on February 28, 2012, an assault with a deadly weapon committed on January 1, 2015, and possessing a drug for sale committed on October 21, 2015. Sankikian interprets Penal Code section 186.22, subdivision (e) to require the earliest predicate offense (the February 28, 2012 conviction) to have been committed within three years of the latest one (the October 21, 2015 conviction). Even if Sankikian’s interpretation of the statute were correct, she never objected to the 2012 conviction. In any event, she misreads the statute. It merely requires the most recent offense—the October 21, 2015 conviction—to have occurred within three years of a prior offense. That conviction did occur within three years of the January 1, 2015 conviction. Thus, the February 28, 2012 murder was not, as she contends, irrelevant or introduced for the improper purpose of trying to connect her to murder.

VII. The sentencing hearing

At the outset of the March 2017 sentencing hearing, Sankikian’s counsel asked for a continuance because she was still going through her client’s medical records, which showed that Sankikian had “significant medical history” that might bear on the case. The trial court denied the request. We discern no abuse of its discretion in doing so.

A continuance in a criminal proceeding “shall be granted only upon a showing of good cause,” and trial courts have broad discretion to determine whether good cause exists. (Pen. Code,

§ 1050, subd. (e); *People v. Alexander* (2010) 49 Cal.4th 846, 934.) We review the denial of a continuance for an abuse of discretion. In determining whether a denial of a continuance amounts to a denial of due process, we look to the circumstances of the case and the reasons presented for the request. (*People v. Frye* (1998) 18 Cal.4th 894, 1012–1013.)

Defense counsel did not offer a persuasive reason for the delay in getting Sankikian’s medical records. Instead, the record shows that defense counsel had the records, but her concern about their “mixed bag” nature caused her delay in presenting them to the court. Indeed, she suggested she was only asking the trial court to consider the records at her client’s insistence. Thus, counsel offered no valid explanation for the delay, other than her own doubt about the relevancy of the records.

On that score, whether the records would be useful was a factor to consider in determining whether to grant a continuance. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118.) Defense counsel offered that the records would show Sankikian had three children taken from her, a miscarriage a few days before she was arrested on the current charges, she was shot in the head ten years ago, and she was on seizure and mental health medications. Sankikian elaborated that she has seizures, has been on suicide watch, and that drug abuse caused her behavior. The trial court said it would not consider the records, as they would not make a difference.

Sankikian, however, argues they would have made a difference to her sentence, as mitigating factors include that the defendant suffered from a mental or physical condition that significantly reduced culpability for the crime. (Cal. Rules of Court, rule 4.423(b)(2).) Nothing in counsel’s offer of proof

indicated that Sankikian had a condition that would relate to her culpability for her crimes or to her decision to be in a gang. In fact, two psychiatrists had examined Sankikian. Therefore, if Sankikian had a condition relating to her culpability, the psychiatrists, rather than the mere medical records, might be more likely to speak to that. No abuse of discretion occurred in denying the continuance.

VIII. Sentencing issues

Sankikian's sentence included a five-year term for a prior serious felony under Penal Code section 667 subdivision (a) and two 3-year terms under Health and Safety Code section 11370.2, subdivision (a).

As to the five-year term for the prior serious felony, when Sankikian was sentenced in 2017, the trial court had no discretion to strike the felony. After she was sentenced, Senate Bill No. 1393 went into effect on January 1, 2019. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.)) That bill amended Penal Code sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike or to dismiss a serious-felony prior for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) Senate Bill No. 1393 applies retroactively to all cases, such as this one, not final when the bill took effect. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

Although the People concede that Senate Bill No. 1393 applies retroactively to this case, the People argue that remand is unwarranted because the trial court's statements at sentencing indicate it would not have stricken the enhancement. The trial court cited Sankikian's gang membership as the primary reason

for denying her *Romero*⁸ motion: “She is one of the people that helps [MS-13] do the murderous, violent, society-destructive things that they do. . . . [¶] So this is not about drugs in my view, this is about a violent, corrosive group that is opposed to our society, is happy to destroy it, happy to kill people. [¶] So Ms. Sankikian is a source of funds for people who do that, and the jury found that’s why she was doing this. And if you choose to associate with people that violent, and that destructive, then you shouldn’t then ask for a drug program or ask to have your prior violent crimes forgiven, in my view, you should take the consequence of your behavior.” These were strong statements and might indicate what the trial court would do on remand. Nonetheless, the statements are insufficiently dispositive to establish definitely what it would do and to deprive the trial court of its discretion.

As to the three-year terms imposed under Health and Safety Code section 11370.2, subdivision (a), the Legislature amended that section, effective January 1, 2018, to remove a number of prior convictions that qualify a defendant for the enhancement. (Health & Saf. Code, § 11370.2, subd. (c); *People v. Millan* (2018) 20 Cal.App.5th 450, 454.) Sankikian contends, the People concede, and we agree that Sankikian no longer has a qualifying prior conviction. The three-year terms therefore must be stricken.⁹

⁸ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

⁹ Because we are remanding for resentencing, we need not address whether the trial court abused its discretion by denying her *Romero* motion, as the motion can be renewed.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.
NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.